JURISDICTIONAL ASPECTS OF ONTARIO'S REGULATION OF FINANCIAL INSTITUTIONS

A staff paper prepared for
the Task Force on Financial Institutions
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I. THE CONTEXT OF INTER-JURISDICTIONAL REGULATION

The mandate of the Task Force, being the examination of the organization and operation of financial institutions in Ontario, involves a great number of both economic and regulatory issues. Political, social and public policy considerations colour every topic subsumed under these two categories; but of the major regulatory issues, one of the most thorny is jurisdiction.

In determining how Ontario should regulate with respect to the issue of competing and overlapping jurisdictions, consideration must first be given to the environment within which the financial system operates. The issue cannot be isolated and then analyzed as a perfect theoretical model in itself but must be set in its proper perspective, in the context of Canadian federalism. Financial institutions in Ontario do not necessarily confine their activities geographically to areas within the borders of the province. Nor is the operation of financial service businesses in the province restricted to Ontario-incorporated firms. From an administrative viewpoint, therefore, regulators need practical mechanisms to cope with cross-jurisdictional transactions in a product which is itself difficult to contain. Furthermore, constitutional, legal and political conflicts, which are endemic to the federal state, exacerbate the problem and the wide variety of regional and cultural interests in Canada make cross-jurisdictional regulation even more difficult to achieve.

Practically, economically, politically and socially, then, Canadian society is pluralistic and it is within this environment that inter-jurisdictional regulatory issues should be explored.

Federalism

The very nature of Canadian federalism involves conflict and conflict resolution. Inter-jurisdictional disputes, debates and negotiations are at the essence of the Canadian political system and are

managed through a complex and highly sensitive arrangement of federal-provincial and inter-provincial relations.

For federalism to function at a practical level in this potentially combative environment, co-operation and collaboration are vital. Canadian federalism has in fact been characterized by a growing co-ordination between the federal and provincial levels of government and among the various provinces.

> The expansion of government activity in the last three decades, in terms of both scope and complexity, into new areas where constitutional jurisdictions are not clearly defined and into areas which cut across the traditional activities of each level of government has meant that interdependence is now the central feature influencing the relationship between governments.[1]

It is not only federal-provincial interdependence that has been steadily increasing. Co-ordination of policy among the provinces has also been improving as inter-provincial relationships become better developed. A certain amount of inter-provincial co-operation is natural. After all, at least among the English-speaking provinces, there are shared traditions of a common legal heritage and parliamentary system, and a largely common language and culture.[2] Historically, for particular projects and issues, alliances have developed among the English-speaking provinces and, in some instances, between them and Quebec. Common economic interests have also been and continue to be at the root of several provincial pacts. Ironically, perhaps the most unifying force for the provinces is their common interest in presenting a strong front against the central government.

Conflict management and resolution are the operative features of the Canadian federal state and a number of formal and informal mechanisms have evolved in every area to facilitate inter-jurisdictional co-ordination of programs and policies and to promote uniformity in regulatory approaches. Financial institutions and their problematic functioning in a multi-jurisdictional environment represent only one of the many areas in which federalism helps to mould the issue and define the solution.

Regulated Industries and Economic Goals

Our society is becoming increasingly regulated; the growth of government regulation in recent years is one of the hallmarks of the age. The problems of trying to establish provincial policy in a pluralistic society are further compounded when the issue involves a regulated industry.

Regulated industries themselves involve a number of special considerations, not only competing social and political interests, and not just from a policy perspective, but legal and regulatory matters of a more detailed and technical nature. When the regulated industry is one that is subject to jurisdictional problems, constitutional conflicts and competing regional interests also come into play.

Government regulation serves and its philosophy is based upon such complex policy principles as protection of the public, preservation of resources, diversification and equalization of benefits, and the stabilization of naturally fluctuating markets and products.

Economic regulation, in particular, may involve many ill-defined or conflicting interests which are not even readily apparent.

> ....(E)conomic regulation must not be viewed simply from a narrow economic perspective but must also be understood in the context of a broader political perspective. Economic regulation having become a tool for the satisfaction of a variety of objectives, economic, social and political, it is central to a clear understanding both of the nature of economic regulation and of the functions of the economic regulator,... that the political dimension be recognized. Indeed, the concept of economic regulation as it has developed in Canada is inherently a political concept and economic regulation is itself a political process.[3]

Financial Products and a National Market

It is to this environment of an economic regulated industry that we must add yet another complicating element, and that is the nature of this particular regulated product.

Governments clearly are able to regulate and control some markets and products more easily than others. Hazardous products, for example, can be identified, inspected and their movements monitored in a clear and definable way. Even transportation and energy, historically two of the most problem-riddled regulated industries in Canada, involve tangible and determinable subjects of regulation. Financial products, however, are another matter. Money flows freely across geographical borders, into and out of different regulatory jursidictions without impediment but with potentially huge repercussions for the capital markets of any one province. Most often the flow is not even in actual currency but in the form of bookkeeping entries or, increasingly, data in computer banks.

The special and flexible character of financial products and their essential role in the health of our capital markets make the regulatory regime for financial institutions one of the most delicate and politically complex of the inter-jurisdictional areas.

During our examination of the extra-provincial aspects of regulating financial institutions, the following factors should be kept in mind as the operative environment: under Canadian federalism, a regulated industry, with a national market, seeking economic goals, consisting of intangible products, of the most fundamental and critical importance to Canadian society.

The primary objectives of the financial system, efficiency, solvency and the health of our capital markets, are the guiding principles in all of our discussions about financial institutions. But in considering Ontario's particular role as a regulator of extra-provincial interests, we must be concerned with more than the protection of Ontario depositors, the profitability of Ontario businesses and the health of Ontario capital markets. Broader policy considerations such as Ontario's role in a federal society and in the Canadian economy as a whole, the responsibility of this government as representative of the largest provincial electorate in Canada and the repercussions of Ontario's legislative actions for other provinces must also guide our deliberations and be taken into account in formulating our final recommendations.

II. THE LEGAL FRAMEWORK

Division of Powers

The current state of regulation of jurisdictional matters in the financial system consists of a confusing collection of legislative provisions, government policies and administrative procedures which has developed over the years but which does not deal adequately with the issue because it does not address the problem consistently, or even directly.

The Canadian financial system operates within a legal framework based on an outdated assignment of powers which was not designed to foresee or meet the needs of evolutionary developments in the financial sector a century later and which was not well-defined even when drafted.

The actual division of regulatory responsibilities between the federal and provincial governments is unclear; and inefficiency, duplication and sometimes conflicting provisions have been the result. While some matters are exclusively federal and others are exclusively provincial, most are areas of dual (or undetermined) jurisdiction. Further complicating the discussion is the fact that the two levels of government have collaborated in some areas and now have shared responsibility for certain aspects of regulation and supervision of the financial services industry.

a) Federal Powers

The Canadian constitution expressly gives the federal government the exclusive authority to legislate in respect of banks and banking. The word banks has come to mean nothing more than institutions that the federal government chooses to call banks; and banking means the

activities carried on by those institutions. However, because of the narrow interpretation given to this constitutional provision, many of the same activities as those engaged in by banks may be carried on by similar institutions which are not technically banks and so do not fall within the exclusive authority of the federal government.

The federal government also has the constitutional authority to make laws in relation to the regulation of trade and commerce. Jurisprudence has limited this power to matters of inter-provincial concern and general regulation of trade affecting the whole dominion. The extent of this power is the central issue in a major body of constitutional case law which still leaves a great deal of scope for creative advocates in the field.[4]

b) Provincial Powers

Under the constitution, the provinces have the exclusive authority to legislate in relation to "property and civil rights in the province", a provision generally interpreted by the courts to include regulation of trades and business, property matters and contracts. The power is expressly limited, however, to matters in the province.

As applied to the financial system, securities regulation is wholly within provincial jurisdictions, not strictly as a constitutional prerogative but more as a matter of practice and convention, reinforced by the courts. Provincial governments enacted securities legislation on the basis of their constitutional authority over property and civil rights and jurisprudence upheld the provinces, even though the securities market clearly transcends provincial borders. Still, although there never has been a federal securities law in Canada, a case for one certainly can be and has often been made out on both constitutional and policy grounds and, at various times, by both federal and provincial governments.[5]

The authority to regulate trust activities, whether performed by a trust company or by an individual trustee, is another matter exclusively within provincial jurisdiction under the rubric of property and civil rights in the province. Once again, it is the law of trusts, and not necessarily the law governing trust companies, that is exclusively provincial.

Finally, credit unions and caisses populaires are chartered and regulated only by the provinces although they are in many cases affiliated with federally regulated financial institutions, such as the federally-registered centrals, the Canadian Co-operative Credit Society or federally-chartered banks and trust companies.

c) Dual Jurisdiction

The Constitution Act, 1867 gives the provinces power to incorporate companies with provincial objects and jurisprudence has established a corresponding right for the federal government so that there is dual jurisdiction in the area of incorporation of businesses. Loan and trust corporations and insurance companies, for example, may be either federally or provincially chartered; they are regulated to some extent by their incorporating statute but may also be subject to the regulatory provisions of other jurisdictions if they engage in activities within the preserve of those authorities.

d) Collaboration

As can be seen from the discussion above, the lines of authority between federal and provincial jurisdiction over financial institutions are blurred. For almost any given area in the financial sector, legitimate arguments can be made for both provincial and federal regulation. Because of the legally ill-defined boundaries between each jurisdiction's authority, the lines have been drawn instead by pragmatic

exigencies which have developed over time in response to practical realities. In some cases this has involved major collaborative projects between the two levels of government.

One such example is the system of national deposit insurance. Although Ontario and other provinces preceded the federal government in passing legislation to provide a system of deposit insurance for deposit-taking institutions carrying on business within the province, the federal government proposed an alternative national scheme before the provincial plans were implemented, and all provinces but Quebec opted to join the national program.

One of the implications of provincial trust companies being involved in a national deposit insurance program is that both levels of government have some stake in inspecting and supervising the financial affairs of those institutions. Collaborative mechanisms, discussed in detail later in this paper, have evolved to minimize duplication for both regulators and the regulated.

Regulation by Institution

Into this overlapping and confusing framework, where the federal government has authority over some functions of the financial system and the provincial governments have authority over others, and both may have authority over the relevant institutions, a structure has grown up primarily in the form of regulation by institution, rather than by function.

Conceptually it may make more sense to regulate by function than by institution, and certainly many have advanced this argument, but the Canadian system, for pragmatic rather than logical reasons, has become extended along institutional lines, with some functional overlap.

In effect this has resulted in a federal Bank Act which regulates those institutions known as banks, both federal and provincial statutes governing trust and loan corporations and insurance companies and provincial credit union statutes to regulate these institutions.

Nevertheless, gaps and overlaps exist in the system of institutional regulation. Although each financial institution is governed by the jurisdiction of its incorporation and is regulated by its incorporating statute, it may be and almost always is subject to regulation by the other level of government insofar as its activities fall within the constitutional authority of that jurisdiction. Any federally chartered institution operating in Canada will necessarily be carrying on business in the provinces and cannot avoid some amount of provincial regulation in respect thereto; likewise, any provincial corporation whose activities extend beyond the jurisdiction of the province will invoke federal law.

The instances of this double regulation are far too numerous to mention here, but a few examples will illustrate the point. Banks are governed federally by the Bank Act but must comply with provincial legislation if they wish to deal in securities; federal trust companies are governed by the Trust Companies Act of Canada but must be provincially licensed and meet the necessary provincial conditions in order to carry on business in any province; provincial trust companies, on the other hand, even if restricted to local operations, may be subject to federal regulation and inspection because of the national deposit insurance scheme although, in practice, federal and provincial regulators have developed arrangements to avoid excessive supervisory duplication.

The extent of overlap and confusion in the regulation of Canadian financial institutions still is tremendous. And, in addition to institutional and functional regulation, financial firms are also

subject to the provisions of many other policies and statutes of general application, such as the federal Interest Act and Small Loans Act, provincial Mortgage Acts and various pieces of consumer protection legislation.

III. EXTRA-TERRITORIAL REGULATION

Within this framework and its overlaid structure, each pillar or sector of the financial services industry has its own way of dealing with extra-territoriality. Traditionally, trans-jurisdictional issues in the financial system have not been approached and dealt with in a cohesive or straighforward way; regulation in certain sectors is quite specific while control over others has been left almost to chance. But given how unstructured and informally matters have been dealt with in the past, it is surprising how well the system, with all its attendant problems, works.

With some possible exceptions, federalism in this constitutionally confused and concurrent regulated industry has been able to function because of the goodwill of the industry participants and the co-operation of the various supervisory and regulatory bodies. With recent developments, however, and anticipated directions in this industry, regulatory needs are being re-defined. Changes in the market are necessitating changes in supervision.

The following is a description of the existing scheme of extra-territorial regulation by the Ontario government for each of the major financial pillars or sectors.

a) Loan and Trust

Loan and trust companies carrying on business in Ontario are regulated by the Loan and Trust Corporations Act. Different types of corporations are subject to different sections of the Act, as provided in section 2. The majority of the provisions apply only to provincial corporations, that is loan and trust companies incorporated in Ontario, while corporations chartered in other provinces or by the federal government are subject only to certain designated parts of the Act. In

attempting to clarify the application of the statute, the Select Committee Report on Loan and Trust Corporations states:

> It is essential to understand clearly at the onset that the Act is both an incorporation and registration statute. It provides for the incorporation of loan and trust companies in Ontario and for their registration to do business in the province. It also provides for the registration of federally incorporated companies and companies incorporated in the provinces that wish to carry on a loan or trust business in Ontario. Certain sections of the Act apply to all registered companies, while others apply only to some loan and trust companies, such as Ontario incorporated companies. These distinctions must constantly be borne in mind...[6]

Under this Act, the basic mechanism for dealing with non-Ontario loan and trust companies wishing to extend their business activities to Ontario is a registration scheme. Section 174 provides that no corporation, other than one that is registered, shall undertake or transact in Ontario the business of a loan corporation or trust company. The effect of this section is to require all loan and trust corporations, whether incorporated in or outside Ontario, to comply with the requirements for registration if they wish to operate in Ontario.

Section 165 contains the general conditions of admissibility to registration for extra-provincial corporations. In its present form, the essential and relevant meaning, which is not disputed, is that loan and trust companies that a) are solvent and incorporated either federally or in another Canadian province, b) have a minimum capitalization of at least $1 million and c) undertake to comply with

and be bound by the provisions of sections 77 to 82 to the same extent as if they were a provincial corporation, may, upon due application, be admissible to registry.

Sections 77 to 82 are the provisions limiting foreign ownership of provincial loan and trust corporations; effectively no single non-resident may own more than 10% of a loan or trust company and the total ownership of a firm by non-residents may not exceed 25% of issued shares. No provision is made for foreign (i.e. non-Canadian) loan and trust corporations to be registered in this province at all. A federal loan or trust company, then, or one incorporated in another province, must be solvent, meet capital requirements and comply with Ontario foreign ownership rules in order to be eligible for registration in Ontario.

Applicants for registry must then file a financial statement and application in the form supplied by the Registrar and must submit such further information, material and evidence as the Registrar may direct (section 161).

Further, loan and trust companies incorporated in another provincial jurisdiction (but, interestingly, not federal companies), have an additional onus to satisfy the Registrar that in the locality in which the company proposes to carry on business there exists a public necessity for a trust company or another trust company, that the fitness of the applicant to discharge the duties of the company is such as to command the confidence of the public and that the public convenience and advantage will be promoted by granting registration to the company (s.165(4)).

On first reading, this requirement appears onerous almost to the point of ridicule but, in fact, it poses few problems in practice. Potential applicants have not raised public objections to the section,

regulators allege that they rarely use it to discourage an applicant, and it may actually help in working towards a general policy goal of serving all geographic areas in the province on a more equitable basis than a simple laissez-faire free competition policy might allow. Another rationale for the existence of this provision is that Ontario loan and trust companies must satisfy a similar test when applying to be incorporated and policy demands that the standards required of extra-provincial corporations wishing to operate in the province be at least as onerous as those demanded of Ontario corporations.

Why then is the same condition not imposed upon federally incorporated loan and trust companies who apply to operate in Ontario? The answer is that a constitutional ambiguity has prevented Ontario from attempting to regulate federal companies beyond what it perceives as its clear authority to do so. Its authority in this regard is an unresolved matter of constitutional debate and will be discussed in more detail later in this paper.

The same ambiguity should also be raised at this point in connection with one of the other tests for admissibility to registration. Section 165(1) clearly stipulates that federal corporations must undertake to comply with Ontario's foreign ownership rules, but whether Ontario has the right to make such a demand of a federally incorporated company is a disputed matter. This potentially ultra vires requirement might not pose a problem if the corresponding federal legislation were no less onerous. This is, however, not the case. Not only is it not the case (federal loan and trust legislation is more liberal than the provincial in terms of grandfathering foreign ownership), but there are actually federally-chartered applicants for registration in Ontario that meet the federal standard and not the provincial one. Clearly there is no satisfactory way of dealing with this issue, short of amending (or ignoring) the legislation.

Leaving aside the issues of foreign ownership and public necessity, extra-provincial corporations must still satisfy the Registrar's discretion before they will be admitted to registry. By virtue of a number of sections in this part of the Act, the Registrar is given a broad discretion to refuse registry for various reasons. The Registrar has "the duty of determining, distinguishing and registering the corporations that under this Act are required to be registered and are entitled to registry" (s.149(1)). Even once registry is granted, the Registrar is entitled to suspend or cancel it on very broad grounds (s.166(1)) although a right of review and appeal of such a decision is also provided (s.168).

The method of regulation of extra-provincial loan and trust companies in Ontario is fundamentally one that relies on arbitrary and discretionary means. The statutory requirements are few, arguably unenforceable and perhaps unconstitutional. The real regulation is done at the discretionary level. Whether this system has worked well or not may be a matter of opinion but that it is an ideal way to regulate is clearly not a tenable viewpoint. In discussing the discretionary powers given to the Registrar and even to the Minister to grant or refuse an application for registry, the 1975 Select Committee Report makes the point: "While the Committee is confident that these powers have been responsibly exercised, it is nevertheless a matter of concern that such wide discretionary powers exist."[7] The Committee's Report goes on to propose that the existing requirements for registration be replaced by other tests, discussed later in this paper.

The inadequacies of Ontario's current system of dealing with extra-territorial loan and trust corporations are apparent. The breadth of discretion is excessive; the industry does not know its rights and duties any better than does the regulator who must enforce them. Even with the power to cancel, refuse or suspend registry, surely a tool to be used only in extreme situations (and in fact rarely used), how can a

regulator really control the ongoing activities of loan and trust companies in Ontario without more clearly defined rules?

The sections of the Act dealing with company powers and permitted investments apply to all registered corporations. This is not where the problem lies. Extra-provincial and federal companies operating in Ontario must meet Ontario standards in all of their dealings in this province. The real problem is that Ontario has no means under the current legislation of ensuring that these corporations apply similar standards in their activities outside the province. If, for example, a federal or an Alberta trust company operates according to very different rules in Alberta from what it is required to do in its Ontario operations, how can Ontario ensure that depositors in this province are being adequately protected by proper regulation and supervision of the trust company's Alberta activities (which have the potential to render the corporation insolvent) if Ontario does not have the constitutional authority to legislate beyond its borders or to regulate activities outside the province?

Under Ontario's existing loan and trust legislation, regulation of extra-provincial companies goes no further than this: pre-conditions of registration must be met and business activities in the province must adhere to Ontario standards. The Ontario regulator may attend at the head office of an extra-provincial company and may inspect generally for solvency (s.154) but has no right to regulate in respect of non-Ontario transactions. Other than the discretion available to the Registrar to refuse or cancel registration, Ontario's only way to protect its depositor citizens by ensuring high standards in all of a company's operations is to rely on the regulation of the corporation by the authorities in its home jurisdiction. Effectively this is what is done now but it is an ad hoc and uncertain way to regulate, especially where either the legislation or administration in that province does not conform to Ontario standards.

b) Insurance

As in the loan and trust field, extra-provincial insurance corporations operating in Ontario are subject to a registration scheme as their primary regulatory control. Section 21 of the Insurance Act provides that every insurer carrying on business in Ontario must obtain a licence or is guilty of an offence, the penalty for which is a fine of up to $25,000 (s.97).

The administration of insurance regulation in Ontario is carried out by the Superintendent of Insurance who is given broad duties in the Act including responsibility for the "general supervision of the business of insurance in Ontario" and the duty to "see that the laws relating to the conduct thereof are enforced and obeyed" (s.2(1)).

With respect specifically to the registration scheme, the Superintendent is given discretionary powers, worded as follows: "The duty of determining the right of any insurer in Ontario to be licensed under this Act devolves upon the Superintendent, subject to appeal as hereinafter provided" (s.9). The actual issue of licenses, however, is done by the Minister who may issue a licence to certain classes of insurers "upon due application and upon proof of compliance with this Act" (s.23).

Since the Act nowhere imposes a duty on extra-provincial insurers to comply with Ontario law in respect of business carried on outside Ontario, we have effectively the same situation in the insurance sector as we reviewed in loan and trust. A federal or other provincial corporation must meet the requirements of a licence and comply with Ontario law while in Ontario but is under no obligation to Ontario investors to match the standards set by the Ontario government in its other operations.

Interestingly, an Ontario insurance company is obliged by the Ontario Act to be duly authorized under the laws of a foreign jurisdiction before carrying on business in that jurisdiction or will be guilty of an offence in Ontario.

Constitutional challenges to any provision in the Ontario statute that inadvertently might have the effect of regulating the activities of extra-provincial corporations are met by cutting down the ambit of the insurance licence. Section 23(2) provides that a licence authorizes the insurer "to exercise in Ontario all rights and powers reasonably incidental to the carrying on of the business of insurance named therein that are not inconsistent with the Act or instrument of incorporation or organization."

Pre-conditions to an insurer obtaining a licence are capital and solvency requirements and "proof that it has complied with the provisions of this Act and the regulations applicable to it" (s.28). In addition to the specified documents and financial statements that must be filed upon application for a licence, an applicant must also "furnish such evidence as the Superintendent considers necessary that the requirements of this Act have been complied with and that the applicant is entitled to the licence applied for" (s.30(2)).

While the provision appears to give a significant amount of discretion to the regulator, its significance is surely cut down by a later subsection providing a statutory entitlement to a licence where the Act has been complied with (s.33(1)). This statutory right of insurers to carry on business in Ontario is very different from the treatment extended to loan and trust companies, for which both incorporation and licence are a matter of prerogative, almost of privilege. Still the Superintendent of Insurance does have the duty of determining entitlement to licences under section 9 so one wonders to what extent an applicant can enforce the statutory right to a licence.

The tools or techniques that regulators may use to exercise their limited powers over extra-provincial corporations are again restricted to matters in respect of the licence. The Minister may prescribe limitations and conditions to which any licence is subject (ss.24(4) and 35(3)); cancellation, revocation or suspension of a licence may only be ordered by the Lieutenant Governor in Council and only after the insurer has been accorded a number of statutory rights and recourses (s.38). Hence the power of the regulator is more greatly circumscribed in the insurance field than in loan and trust, where discretion at the level of departmental administrators is far broader and the rights and remedies of applicants far fewer. Note, however, a seemingly contradictory section, buried later in the Act (s.44), giving the Minister the discretion to suspend, cancel or refuse to renew an insurer's licence for a contravention of the Act.

The regulators in this field are given very wide powers of inspection under s.15, an important tool at least in assessing the operation of extra-provincial insurers. However, the constitutional limits of s.15(2), which permits a Minister the discretion to instruct a Superintendent to visit the head office of an insurer outside Ontario to inspect and examine its affairs, are unknown and could not in any case extend to something more than inspection. Specific references are made in the Act to adopting the inspection of some other governments (s.15) and, at a practical level, this is how a significant amount of insurance inspection is carried out. Still for the actual supervision of non-Ontario corporations, Ontario must again rely on the work of regulators in the corporations' home jurisdictions.

Inter-provincial and federal-provincial co-operation among insurance regulators in Canada is significant and longstanding. The Association of Superintendents of Insurance was formed in 1917 to work towards an eventual goal of uniform legislation and this has been largely successful, recent developments in Quebec aside. Across Canada,

life and health insurance policies are now uniform and joint annual statements and practices are also regularly agreed upon and issued by multiple jurisdictions.

The federal presence is more dominant in the insurance sector than in loan and trust. Most insurance business in Canada (90-95%) is transacted by federally-chartered companies subject to provincial licencing requirements and, as a result, there is potential overlap in the areas of inspection. In reality, while most provinces maintain some degree of regulatory control over federal insurers operating in their jurisdictions, compliance with federal legislation is often considered either a wholly or partly sufficient substitute for provincial standards.

Two other notable differences exist in the regulatory scheme for insurance as opposed to loan and trust. Self-regulation is becoming more important and relieving regulators of some of their burden (the Registered Insurance Brokers of Ontario, for example, is a newly-created self-regulating organization); and insurance legislation itself focusses more on regulating the products of institutions, particularly insurance policies, than does corresponding legislation in any other pillar. These two factors may have eased or contributed to the degree of intergovernmental co-operation that regulators have been able to achieve in this sector by more clearly defining the areas of joint concern where collaboration is possible.

c) Securities

The security industry has the smoothest system of extra-territorial regulation of all the financial pillars. This system involves no federal regulation at all. In spite of the fact that the nature of the industry is undeniably national and that securities

transactions constantly cross provincial borders, provincial regulation seems to function quite efficiently alone.

Under section 92(13) of the Constitution Act, 1867, which gives the authority to legislate in respect of property and civil rights in the province to provincial legislatures, provincial securities laws have continued to be upheld by the courts since the decision of the Privy Council in Lymburn v. Mayland, [1932] A.C. 318. The recent Supreme Court of Canada judgment in Multiple Access Ltd. v. McCutcheon (1982), 138 D.L.R. (3d)1 stated (at p.18) that "it is well established that the provinces have the power, as a matter of property and civil rights, to regulate the trade in corporate securities in the province."

The ability of the provinces to legislate in the area is now clear; but their authority to do so extends only to dealings in securities in the province. No province can legislate in respect of inter-provincial undertakings. Presumably, this falls within the federal sphere but the federal government has never occupied the field of securities regulation so its authority in this area remains untested. It does not, however, remain unexplored. A federal securities law has been and continues to be advocated by many, either as replacement for or in addition to the existing system of provincial regulation.[8]

The Porter Commission proposed strengthening of securities regulation and establishment of a federal regulatory agency in 1964 "to give leadership in the field and to work in co-operation with the provincial authorities."[9] Various federal initiatives were subsequently undertaken to study the Canadian securities market with a view to ascertaining the appropriate nature and degree of federal regulation. These culminated in the publication in 1979 of the Proposals for a Securities Market Law for Canada consisting of a comprehensive draft act accompanied by extensive commentary and numerous background papers. However major and persuasive a piece of work these proposals may have

been, the federal government for some reason decided not to act upon them and has since indicated that it has no plans to implement them. Moreover, the recent federal Green Paper seems to have laid to rest any prospects of immediate federal intervention in the area (although Tom Courchene argues that it may represent, at a more subtle level, the basis of eventual federal entry into the field of securities regulation).[10]

Since no public document has been circulated to explain the rationale for not proceeding with federal securities legislation, we may speculate as to the reasons for this reversal of policy. It may simply represent a sacrifice or sort of quid pro quo, especially in view of the current federal proposals to take over the regulation of financial holding companies. It may also reflect federal assessment of the status quo as efficient and well-run without intervention at the national level. This is not an unreasonable supposition given that, of all provincially-regulated sectors or pillars, the securities industry has developed perhaps the most sophisticated system of regulation to deal with extra-territoriality.

> In an era where the provinces are coming under increasing criticism for "province-building", i.e., erecting barriers to the internal common market, the securities market area represents a sphere of economic activity where they appear to have performed quite admirably. This is not to say that the provinces' actions are motivated solely by national concerns. They probably are not. However, there are powerful forces at work in the system to ensure some considerable degree of harmonization.[11]

In some ways, the securities industry seems the most likely candidate of all for federal regulation, as it so clearly national in

nature; yet the current, strictly provincial regulatory framework provides a through and effective means of regulating trans-jurisdictional issues without the necessity of federal mediation.

> That the functions performed by the securities market transcend provincial boundaries in undeniable and economists have long recognized that the financial market in Canada is national in scope. Indeed this fact is demonstrated by the cooperative efforts of the provincial securities administrators, for example, in the adoption of "national policy statements" and in particular by the first such statement which establishes a co-operative system to avoid unnecessary delays in the clearance of prospectuses for national issues. It is clear that provincial borders are irrelevant to buyers and sellers of securities unless artificial boundaries are erected by law and that the efficient functioning of the primary market in Canada, if nothing else, creates pressures compelling the adoption of national policies.[12]

The above statement is made in support of the argument for federal control over regulation of the securities industry. But, in fact, the adoption of national policies has already been effected without the intervention of the central government. . The current framework of securities regulation in Canada is based upon a securities statute and regulations in each province (and ordinances in both of the territories). In addition, each of the ten provincial jurisdictions has issued policy statements, many of which are national statements issued jointly by all ten provinces. Still others are uniform statements issued jointly by the five provinces (including Ontario) that, until recently, shared a uniform act.

The Ontario Securities Act R.S.O. 1980, c.466 was revised substantially effective September 1, 1978 and since that time several other provinces have adopted similar legislation. Prior to 1978, the Provinces of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario all had very similar securities statutes and were known as the Uniform Act Provinces. Together they issued a number of Uniform Act Policies or joint policy statements on the administration of securities regulation in those provinces. A series of national policy statements were also agreed upon by virtually all of the provinces in an effort to facilitate the approval of a prospectus in multiple jurisdictions and to provide for uniformity of administration. The national and uniform act policies currently are undergoing revisions to bring them into line with the recent revisions to the legislation.

The basic framework of regulation, over which is superimposed a complex assortment of rules and exemptions, is to require all traders, investment advisers and distributors of securities to be registered and all issuers of securities to provide disclosure. Although the securities industry is subject to separate legislative regimes in each province, provincial regulators have been very effective in dealing with the national scope of the market. Co-operation among the provinces in the securities field may, in fact, provide a model for collaboration in other trans-jurisdictional financial sectors. Without regulating extra-provincially, the provinces have developed a successful means of co-ordinating securities regulation across provincial borders. This has been done at two levels: first, uniform statutes and policies have been developed through the co-operative efforts of all provinces and, second, systems have been organized to orchestrate overlapping administrations. Regulators from each jurisdiction meet regularly each year to work towards eliminating duplication for regulators (and for issuers) in inspection, filing and supervision procedures and to harmonize policies.

There are some disadvantages to maintaining provincial regulation. "One consequence of the multiplicity of provincial securities regimes is that public offerings of a new issue must be cleared in each jurisdiction in which the issue is offered for sale; likewise, securities dealers must be separately licenced in each province in which they conduct their business and submit to this supervisory regime or rules and practices."[13] But these are, in the main, only inconveniences, most of which either have been or will be eliminated as regulators find the resources and means to co-ordinate practices wherever feasible.

Co-operation not only works; it provides a much greater degree of flexibility and accommodation of differing viewpoints than a single national system ever could. As the OSC indicated in its decision on the access to discount services provided by the TD Bank's Green Line Investor Service (GLIS). "The regulation of the Canadian segregated financial system is of course complicated by its multi-jurisdictional nature. We support this multi-jurisdictional regulation on the basis that it is more sensitive and responsive to the needs of various activities and regions."[14]

Even the Porter Commission Report, though recommending establishment of a single national exchange, recognized that its own solution "would fail to take account of the country's significant regional variety and of the need for local exhanges to provide a centre for the shares of smaller and less nationally-known companies."[15]

Furthermore, the problems that the Porter Commission, among others, proposed to redress through a national securities agency have largely been eliminated by the provincial regulators. Uniformity of legislation, agreement, co-operation, reduction of duplication, higher administrative standards, better enforcement of the laws and improved investor information were the Porter arguments for federal regulation.[16]

One might just as convincingly argue the same points now in favour of provincial regulation.

Regulation of the securities industry differs from regulation of the other financial pillars in two other significant and relevant areas: first, self-regulation within the industry is of critical importance, and, second, administration of securities regulation is by an independent regulatory agency and not a government department.

Supervisory and regulatory functions are delegated by Ontario legislation to the Toronto Stock Exchange, the Investment Dealers Association and the Ontario Broker-Dealers Association. The self-regulation of these participants in the securities business represents a professionalism and responsibility not accorded to other players in the financial services industry, although there is now an increase in self-regulation in the insurance field. Similarly, the greater powers and independence of the regulatory agency charged with administration of the Securities Act reflect a more practical and professional and less political approach to supervision. As Richard Schultz points out, however, "It is the adjudicative function of regulatory agencies that provides the only compelling argument for agency independence. Regulatory agencies must be independent when they are called upon to make decisions affecting competitive proprietary interests."[17]

Perhaps the securities industry, as sophisticated and complex as it may be, is more easily regulated than others in the financial system since it invovles more clear-cut supervision of specific transactions and issues and less regulation of the entities themselves and their long-range solvency. Still, it seems to be constantly evolving, adapting to the charges in the marketplace and

incorporating a national perspective when most other pillars of the financial system have been at a virtual standstill for decades.

d) Banks

The largest pillar of the financial community, the banks, is the one least subject to provincial regulation. Section 91(15) of the constitution gives exclusive authority over banks and banking to the federal Parliament. The Bank Act provides for the chartering and regulation of all banks in Canada, and to the extent that it legislates strictly in respect of banks and banking, it is exclusively within the jurisdiction of the federal government and the provinces have no authority in respect thereto. However, where the Bank Act purports to grant to banks certain powers that do not constitute "banking" within its constitutional meaning, then the banks may be subject to provincial legislation in the exercise of those powers.[18]

As already pointed out, the terms "banks" and "banking" are not defined in the Bank Act or in other statute. In examining this issue in the 1960's, the Porter Comission looked both at jurisprudence and legislation and concluded that the cases "fail to provide any precise answer. As far as we have been able to determine, Canada is not alone, for we have not come across an exact definition of banking in the statutes of any country."[19] This ambiguity is still the case today. Banking is exclusively within the federal preserve, and the Bank Act is the statute that regulates banking; it is "clear however that everything a bank has the power to do under the Bank Act is not within exclusive federal jurisdiction."[20] Where the type of activities engaged in by bank falls under the authority of the provinces provincial regulation will apply.

There is no constitutional authority for the direct regulation of banks by provincial statutes[21] but certain bank functions

may come within the regulatory ambit of the provinces. If, for example, banks were permitted to perform trustee functions under the Bank Act, which they are not, they would also be subject to provincial trust laws in the exercise of those functions, as the law of trusts is a matter exclusively within provincial authority. The area where banks are in fact subject to provincial regulation is in the securities field since, like trusts, securities law is generally accepted to be a matter of property and civil rights, within the power of the province, and yet the Bank Act authorizes banks to "acquire, deal in, discount...securities" and "act as financial agent for any person...in relation to securities" (s.173(1) (c) and (h)). Sections 190 through 192 are still more particular as to the investment of banks in the purchase, sale and underwriting of securities, and there are various other provisions in the federal legislation touching on the securities-related activities of banks.

The Ontario Securities Act, on the other hand, regulates securities transactions (not otherwise exempt) for all institutions, whether they be banks or any other corporation, and clearly applies to the trading of securities by banks in some situations. In particular, provincial regulation extends to the distribution of bank-issued securities to the public, to the dealing in securities by banks on their own account or as agents or underwriters, and to the realization of bank-held security interests in certain loan transactions. (For further information about the extent of bank involvement in the securities field, see the proceedings of a November, 1984 Insight Conference on Banking Law and Practice, particularly the papers by John Clarry, Purdy Crawford and Garfield Emerson).

A recent jurisdictional dispute relating to the regulation of a bank's foray into securities involved the Toronto Dominion Bank's development of the Green Line Investor Service. The right of the bank to offer a discount brokerage access service to bank customers was

challenged by members of the investment community before the Ontario Securities Commission as an encroachment upon the exclusive territory of the securities industry. The decision of the OSC, released on October 31, 1983, concluded that banks and other financial institutions should be permitted to offer access to discount brokerage services but only under controlled conditions.[22] Unlike industry views, the perspective of the Ontario regulators which emerges on reading the GLIS decision is not adversarial towards the banks but concordant. In anayzing the overlapping provisions of the Bank Act and the Securities Act, the Commission states, "As securities regulators and as interpreters of this legislation for purposes of our Report we have been impressed with the rather neat fit between these two statutes..."[23] Later in its Report, the OSC concludes, "The evident thrust of the Bank Act is to constrain rather than enlarge the securities-related powers of banks."[24] To the limited extent that there is extra-territorial regulation of the banking sector by the Province of Ontario, it appears to have worked well and to have evolved with some degree of co-operation between the two levels of government.

Except for the examples given above, regulation of the banking sector is solely federal and is done solely at the institutional level. The banking industry, however, to a greater extent than any of the other pillars, is truly national in scope. The nation-wide branch banking which all major Canadian banks offer is in fact a distinctive feature of the Canadian system and cannot be ignored in a discussion of multi-jurisdictional regulation since it presents an illustration of efficient federal administration.

> At one time there were many banks in Canada, some private and some "chartered" by governments. By and large they were local institutions issuing notes which circulated in their own areas and concerning themselves very little with the affairs and

> requirements of other parts of the country. Although the early charters did not always clearly permit branching it was never prohibited, and as business and commerce became more national in character some of the banks began to expand their horizons. Branches were opened in the more important centres and business relations were established in other provinces. In the United States a system of local "unit" banks was deliberately fostered, but in Canada the first Dominion legislation explicitly allowed branch openings and thereby encouraged a system of national banks to develop.[25]

The Bank Act is administered by the federal Inspector General of Banks who acts as regulator of banks for that statute and for the Canada Deposit Insurance Corporation. Regulatory mechanisms include weekly, monthly, quarterly and annual returns, the renewal of bank charters by the Inspector General every ten years, restrictions on activities as opposed to investments and stringent liquidity safeguards and capitalization requirements.

The 1964 Porter Commission proposed that the Bank Act be extended to cover a wider group of institutions engaged in banking activities and that any financial institution not governed by the banking legislation be prohibited from engaging in the business of banking.[26] Such a major regulatory change would have had a drastic impact on provincial regulation but has had few active advocates since that time. The recently released federal Green Paper on Regulation of Canadian Financial Institutions puts forth a different federal regulatory approach which, however, may have just as significant an impact on provincial regulation.

e) Credit Unions

Credit unions and caisses populaires, representing the so-called fifth pillar of the financial system, are incorporated and regulated solely at the provincial level. Federal intervention in the area has been relatively recent and has been designed to complement rather than duplicate the provincial regulatory scheme.

In this sector, as in others, provincial regulation is authorized by virtue of the constitutional jursidiction over property and civil rights in the province. Once again, the federal government might argue its ability to regulate in this sector either under the banking power or in respect of businesses involved in interprovincial undertakings. Credit unions apparently sought federal regulation in their early days but have been and remain satisfied with provincial regulation as are regulators and policy-makers.

> ...(T)hese institutions make a particular contribution to the financial system in large part because of their local character and adaptability to differing circumstances across the country and ...it is therefore desirable to preserve as much local initiative and independence as possible.... As relatively small, local and independent societies they can be regulated more efficiently by the joint efforts of provincial governments and officials of their own leagues who are throughly familiar with their methods and with the special problems they may encounter.[27]

The regulatory framework operates on three levels. First, the local credit unions are provincially chartered and regulated and function as independent entities. They join together for common

purposes, however, at the second level to form "centrals" also kown as leagues or federations, and these are also provincially chartered. However the centrals may be (and are in six provinces, including Ontario) subject both to their provincial regulation and to federal regulation under the Co-operative Credit Asociations Act. The provincially incorporated centrals may apply to be certified under the federal statute, and thereafter report to the federal Superintendent of Insurance. At the third level, the provincial centrals own and control the national central organization, the Canadian Co-operative Credit Society Ltd. (CCCS), a federally incorporated body governed by the Co-operative Credit Associations Act.

Extra-territorial regulation in this sector is unique. The Ontario Credit Unions and Caisses Populaires Act does not provide a regulatory scheme based on licensing or registration of extra-provincial institutions and does not purport to extend its regulatory ambit to non-Ontario credit unions. The Act provides and in the main deals with the incorporation and regulation of Ontario institutions. There is provision for extra-provincial credit unions to carry on business in the province but only for limited purposes and only where it is arranged through a reciprocal agreement reached between Ontario and the other provinces.[28]

Similarly, any Ontario credit union "may exercise its powers beyond the boundaries of Ontario to the extent to which the laws in force where the powers are sought to be exercised permit, and may accept extra-provincial powers and rights."[29]

However, given the local nature of the credit union business and membership, extra-territorial regulation is not a crucial issue and most institutions are uninterested in expanding into multi-jurisdictional dealings.

IV. THE EQUALS APPROACH

Need For Change

Our examination of the current system of regulating extra-jurisdictional issues indicates how convoluted and random the status quo is with respect to the treatment of federalism in an industry that is in large part provincially regulated. Twenty years ago the Porter Commission's conclusions on the regulation of Canadian financial institutions were that "the present assortment of laws governing such institutions is no longer suited to the needs of the country; it subjects them to illogical and inequitable restrictions which do not serve them, the financial system or the community well while failing in some cases to provide adequate supervision of their activities."[30]

Some improvements have taken place since then, most notably in the realm of supervision and administration. Still, the existing legislation is unsystematic and disordered. Where it has worked well, it has done so in spite of the legislative structure.

It is clear that the structure itself could be improved if re-designed or at least if unravelled and re-arranged. Basic deficiencies in the legislation have forced governments to consider new approaches to regulating extra-provincial companies. The factors influencing change referred to in our Interim Report have also placed greater demands on the regulatory system. In particular, the recent regulatory developments in the Province of Quebec, discussed at length elsewhere[31] have created a new set of problems in the field of extra-territorial regulation. Further, as Tom Courchene points out, "The current jurisdictional (federal-provincial) regulatory overlap is such that this process of financial integration is almost sure to intensify. In particular, Quebec's regulation-by-function approach lends official sanction to financial integration."[32] Ontario urgently

needs a policy to respond both to Quebec and to the other players in the regulatory environment.

Ontario's Goals

In seeking to regulate the activities of extra-provincial financial institutions operating in Ontario, Ontario's specific interests are to promote its own businesses and industries, to protect its citizens who deal with those foreign institutions, and to maintain the public confidence in the financial system.

The primary responsibility of the government is to safeguard its own residents and taxpayers against insolvencies in the financial corporations that the government allows into the Province. The onus on governments is greater now that it ever has been following the recent collapse of so many financial institutions and the emerging public expectation, reflected in the public opinion survey conducted for the Task Force, that provincial governments owe a duty to the depositors and clients of the businesses licensed and regulated by those governments. This obligation to protect the money of the citizenry extends above and beyond any protection provided through a deposit insurance plan.

For these reasons, the Ontario government must ensure that extra-provincial financial institutions engaged in business in Ontario are subject to a satisfactory level of regulation and supervision. Furthermore, the Ontario government is committed to working together with the other provinces and federal government to improve the regulatory system for the entire financial services industry across Canada. As one of the largest and wealthiest provinces, as an acknowledged leader in legislative initiatives, and as the jurisdiction with the most concentration of financial services businesses, Ontario obviously plays a pivotal role in developing a uniform system of regulation of financial institutions.

Ontario's Proposals

Ontario's basic proposal for regulation of extra-territoriality in the financial services industry is a policy that it has termed the 'equals approach'. This concept has been publicly discussed thus far primarily in relation to the loan and trust field because this is where plans for major legislative initiatives are currently most advanced. As a considerable amount of thought and discussion has taken place with respect to application of the equals approach to loan and trust regulation and most resources consequently are available in that context, this paper also will emphasize the loan and trust area in analyzing the equals concept. A brief discussion of its application to the other pillars will be provided later.

The Concept

The conceptual groundwork for the idea of the equals approach was laid in the 1975 Report of the Select Committee on Company Law on Loan and Trust Corporations. In describing the conditions that an extra-provincial corporation should be required to meet in order to be registered in Ontario, the Report recommends that,

> (T)he corporation must be incorporated and licenced in good standing under laws of its jurisdiction of incorporation, which contain provisions that are substantially similar to those of the Act. The Committee is aware that uniformity of legislation does not exist between all provinces and that difficulties in applying this requirement could arise....In such a case, the Committee believes that the Act should provide that the Registrar shall require an undertaking from the corporation to comply with the provision of the Act.[33]

The idea was developed further in the November 1983 Ontario Proposals for Revision of the Loan and Trust Corporation Legislation and Administration in Ontario (the "White Paper"). From the idea that regulation in the home jurisdiction would be allowed if substantially similar to that of Ontario, the policy became the requirement that Ontario law be precisely the common standard.

> The public in dealing with and entrusting their funds to loan and trust corporations carrying on business in this province are entitled to assume that they are all subject to the same rules and controls and are all required to conform to the same standards. It is proposed to amend the Act to ensure that all loan and trust corporations carrying on business in Ontario be subject to and abide by the same regulations and standards.[34]

The Standing Committee on the Administration of Justice, in its report on the proposals expressed in the White Paper, supported the principle of strong assertion of provincial jurisdiction and agreed with the concept of the equals approach. In fact their report contends that "provincial jurisdiction over the matter should be strongly asserted, and that if the federal government wishes to challenge provincial authority, the issue should be decided by the courts."[35]

The concept has recently been given more shape and detail and has been the subject of government consultations with other regulators and industry representatives. The recent MCCR departmental discussion papers and draft loan and trust legislation propose adoption of an equals approach which would require all financial institutions operating in Ontario, regardless of origin of incorporation, to adhere to the same regulatory standards. The rationale for the concept is that there should be equality of application of the law to all corporations

operating in the Province in order to ensure equal protection for depositors and a relatively equal competitive market among companies. A legal opinion from counsel in the Ministry of the Attorney General supports the view that there is authority for the Province to require registration of any corporation carrying on business in Ontario and to regulate and enforce requirements of registration subject to some constitutional limitations. Ontario concedes that, since this approach involves exercising provincial jurisdiction in a new way, there could be constitutional challenges but takes the position that, providing the legislation is properly drafted, Ontario can require all companies operating in Ontario to adhere to the same standards.

The Constitutional Limits

Except for banks, whose incorporation is exclusively federal, both the provinces and the federal government have the authority to provide for the incorporation of businesses, including financial institutions. However, neither has the automatic authority to regulate the activities engaged in by its corporations since companies may have been chartered with powers or objects that do not fall within the regulatory power of the incorporating jurisdiction. Furthermore, if the subject matter of the regulated activity is within provincial legislative jurisdiction (as a sub-category, for example, of property and civil rights), then the province has the right to regulate that part of the activity occurring within provincial borders, even where the company's activities extend to other provinces. Similarly, if the undertaking is federal in subject matter, it will be regulated federally even where carried on by a provincial corporation and even if it is strictly local. The distinction to be made is that the incorporating jurisdiction confers the basic legal status and capacities; business activities, however, will be regulated by whichever government has authority over the subject matter.

Assuming that Ontario has the constitutional authority to legislate in respect of all financial services except banking, we can extend these constitutional principles to provide a justification for regulation of the activities of extra-provincial institutions, with two important qualifications.

The first is in respect of federal corporations. A province may not enact legislation that would have the effect of destroying or impairing the status and essential powers of a federal company. This principle was firmly established by the Privy Council in the two leading cases of John Deere Plow Co. v. Wharton [1915] A.C. 330 and Great West Saddlery Co. v. The King, [1921] A.C. 91 wherein it was held that provincial legislation will be invalid if its effect would be that a federal company is 'sterilized in all its functions and activities' or if 'its status and essential capacities are impaired in a substantial degree'. A recent decision of the Supreme Court of Canada[36] authoritatively confirms the right of the Province to regulate federal companies provided the regulation does not exceed these boundaries.

To the extent, then, that Ontario regulates the activities of federally incorporated financial institutions, it must be careful not to contravene the constitutional doctrine of sterilization or impairment of essential capacities.

The second limitation on Ontario's extra-jurisdictional regulatory capacity is that no province may legislate extra-territorially or in respect of inter-provincial undertakings. Because of the territorial nature of the provincial powers limiting legislation to matters in the province, a provincial government only has jurisdiction to regulate within its own borders. Jurisprudence has defined the territorial power in such a way that provincial legislation may extend beyond the province but only where 'the pith and substance'

of the legislation is within provincial competence and its effects on extra-provincial rights are merely incidental or consequential.[37]

Needless to say, these are areas where the fine points of constitutional law are better left to the courts or to those more interested in pursuing legal theory. For our purposes, it is sufficient to note that while the legal issues involved in this discussion are not beyond dispute, in the absence of a constitutional challenge there is authority supporting Ontario's adoption of the equals approach as a mechanism for extra-territorial regulation and Ontario is prepared to litigate in order to defend its views.

The form of regulation that Ontario proposes to introduce will be a registration scheme that first, will demand no institution engage in business in the province without being registered and second, will require the institution, as a condition of registration, to comply with Ontario law in all of its operations wherever carried out. The legislation will not directly regulate extra-provincial rights, inter-provincial undertakings, or federal corporate capacities. Rather it will direct only those corporations wishing to register in Ontario to comply with the Ontario regulatory scheme as a condition of registration here.

The Legislative Model

In regard to loan and trust legislation, the proposed legislative model is simply to require any extra-provincial applicant for registration in Ontario to give an undertaking to comply with the Ontario Act and with any other condition imposed on its registration. The effect of this provision will be to extend equality of application of loan and trust regulation to all corporations operating in Ontario.

In practical terms, the effect of this section can be demonstrated with reference to the so-called basket clause which permits an otherwise prohibited and more general category of investment up to a certain ceiling. Alberta legislation currently tolerates a 10% basket clause; Ontario and federal legislation provide a limit of 7%; assuming no other changes in the investment rules, the effect of the equals provision will be to require Alberta trust companies to limit their investments in the basket to 7%.

Another illustration of the equals principle in operation is offered by the provision in section 185 of the Ontario statute limiting the amount of any single investmnet. The corresponding federal legislation provides no such quantitative limit. The draft proposals will eliminate the discrepancy by requiring federal trust companies to comply with Ontario limits which, in fact, they do now but on a goodwill basis only.

Administration

Administration of the scheme will involve some changes to the existing supervisory process.

The approach to inspection of registered companies is new. The draft legislation proposes to require the Superintendent to attend for inspection at the head office of each registered corporation once each year or such other period as the Superintendent determines appropriate. This may be contrasted with the current legislation under which field examinations of non-Ontario corporations are discretionary, not mandatory. Not only must extra-provincial companies be inspected; the inspection must be carried out in the field and the inspector cannot substitute inspection by written returns.

In the draft Act, the purposes of the inspection are more clearly defined and emphatic. The Superintendent will have a positive duty to inspect and examine the statements of the corporation and make such inquiries as are necessary to ascertain its solvency, the policies of its management, and its compliance with the legislation and any conditions imposed on its registration. This represents a substantially greater supervisory burden than does the existing legislation where the duty to inspect is only for solvency and only for Ontario companies.

The equals approach also relies on the continued and improved co-operation of all other provincial and federal governments. As an alternative to the inspection process above, the draft Act proposes to permit the Superintendent, if satisfied that an examination conducted by the Government of Canada or by any province complies with Ontario standards, to accept and adopt such examination in whole or in part.

For such a supervisory system to be feasible, clearly Ontario hopes to be able to adopt the inspections of other governments, as they do now in effect, in order to avoid not only huge numbers of inspections, but also to prevent duplicating the efforts of other regulators. However, Ontario will be introducing a new standard of inspection which is not called for in other jurisdictions. Other governments examine for solvency but not for management practices or for compliance with the Ontario Act. For example, if the legislation of other jurisdictions does not impose a prudent lending standard and Ontario legislation does, then the Superintendent will be required to inspect extra-provincial corporations for compliance with that standard and will not be able to substitute the inspection of another government carried out to a different standard.

However, this may not pose too great a regulatory burden for very long since indications are that many provinces plan to adopt legislation according to the Ontario model as soon as possible.

The existing reality is that most extra-provincial loan and trust corporations in Ontario are federally chartered. Of those that are provincially-incorporated, most are Quebec companies. For example, in the year ending 1982, of 192 loan and trust corporations registered in Ontario, 28 were Ontario-chartered, 49 were federal, 12 were Quebec companies, and only 3 trust companies were registrants from other provinces (2 Manitoba and 1 Alberta). Effectively then, the increased regulatory burden for Ontario will be with federal and Quebec firms. The integrity of federal inspection standards for solvency is not questioned by Ontario regulators and we can assume that federal inspections may be adopted in the solvency respect. However, the federal process does not extend to the other supervisory categories and so Ontario will be required to monitor federal companies more closely under the new legislation.

With regard to Quebec firms, perhaps this is where the heart of the whole matter really lies. Quebec's current tendency towards deregulation in the financial services industry has struck fear into some of those who feel obliged by public expectations to ensure the solvency of institutions over which they have no regulatory control. The equals approach addresses this problem and the increased regulatory difficulties that it demands are perceived to be worth the cost. Still, most of the Quebec trust companies either do not have a significant presence in Ontario or are in the process of transferring that interest to federally-chartered sister trust companies. The smaller companies, and these are the majority, may well be willing to sign undertakings to comply with Ontario law.

In discussing the implications of competitive deregulation among provinces, the 1969 Parizeau Report recognizes practical realities:

> At any rate, companies operating throughout Canada, wherever incorporated, will confront a clear-cut choice. (a) If they retain their present charters, they will have to make their operations conform to the most restrictive legal or regulatory provisions. If Ontario requires adherence to far stricter business practices than Quebec, a company active in both provinces will carry on all its activities in accordance with Ontario law. This has always been done in the past and will continue to be the rule. Since in many respects the Committee's recommendations are more liberal than comparable provisions in federal and other provincial law, any resultant Quebec legislation will give Canada-wide companies powers they will not exercise. (b) If, as compared with legal requirements elsewhere, Quebec law offers sufficiently broad advantages, national corporations will create Quebec subsidiaries and obtain Quebec charters for them.[38]

Actual methods of supervision such as inspection procedures, the assessment of form returns, and field and desk examinations will not be significantly different under the proposed plan from methods in use now. There has been a great deal of recent improvement in administration and enforcement mechanisms due in large part to the collective efforts of regulators in the field. Trust companies administrators, for example, meet annually on a formal basis and communicate more frequently at an informal level. One of the achievements of this group has been the

endorsement by all provinces and the federal government of a uniform set of returns and statements to be filed by all trust companies in Canada.

As members of CDIC, all trust companies are required to file certain forms at the federal level. These forms have been agreed upon by all provinces as the basic returns to be accepted by provincial jurisdictions also so that no reporting duplication or overlap occurs either for firms or for administrators. All trust companies in Canada must file the same three basic returns, although often to two levels of government: an annual return in prescribed form, a condensed version which is semi-annual, and quarterly liquidity reports. In some cases individual provinces may also require an additional appendix or, as in Ontario's case, a monthly monitoring statement to ensure compliance with its own specific standards but the basic forms are the same for all trust companies, wherever incorporated.

The major area of administrative revision under the draft Act is in the general regulatory scheme, designed to be more flexible and responsive. The current legislation does not provide the capacity to deal with developing problems and, as a result, regulation in the past has often been effected on the basis of "gentlemen's agreements". The draft Act proposes to allow regulatory intervention at an earlier stage and to permit a broader range of regulatory responses.

The principles of regulatory intervention in the draft Act also represent a more cohesive and organized approach to supervision than now exists. The proposed "graduated regulatory response of the Registrar" will extend not only to Ontario companies but also to extra-provincial firms, insofar as this is possible.

> The enforcement system proposed represents what the Ministry views as the ideal approach, one which should therefore apply equally to all corporations

> given the privilege of carrying on business in Ontario. The enforcement system will apply where Ontario has jurisdiction and is based on a preliminary favourable opinion of the Ministry of the Attorney General that Ontario has constitutional jurisdiction to license or refuse licences to extra-provincial corporations desiring to enter the lucrative Ontario market. To bolster such jursidiction, Ontario may need to use contracts binding extra-provincial corporations to the Ontario jurisdiction or to receive undertakings from directors or officers residing in Ontario. These mechanisms are currently being explored with the Ministry of the Attorney General.[39]

Extension of the Concept to the Other Pillars

In the loan and trust section of the financial system, the move to the equals approach recently has been gaining momentum. Since the legislation has not undergone substantial revision for decades and needs to be thoroughly overhauled in any case, it seems like a logical starting point for development of a conceptual policy in relation to jurisdictional regulatory issues in general.

Before having an opportunity to be tested in the field for which it was devised, however, the concept already has had to be extended in theory to the insurance sector. Until June 1984, insurance legislation was reasonably uniform across Canada. With Quebec's passage of Bill 75, however, significant regulatory differences were approved for Quebec insurance companies, several of which operate in Ontario. As a result of these changes, Ontario is concerned that it may no longer automatically assume the solvency of these firms and may, as a consequence, be exposed to liability in respect of its obligation to

protect Ontario residents. Implementation of the equals approach in the insurance field is now under serious consideration and will likely be discussed in the final report of the Task Force. Practically, the extension of the concept to insurance involves the same general considerations as in loan and trust. There already is a great deal of uniformity in insurance administration with uniform policies across Canada and the groundwork for co-ordination of regulation is already laid. Insurance administrators from across Canada meet regularly to agree on such very matters. A more demanding aspect of applying the equals approach wil be the re-drafting of the various provincial and federal Insurance Acts to achieve substantial uniformity; but new legislation is long overdue and is currently in the process of being drawn up, spurred on by developments in Quebec. The most immediate concern is that licences of extra-provincial insurance companies expire automatically and are renewed on June 30th in each year. This year's deadline is fast approaching and little has been done since last year to attempt to deal with the issue.

For very different reasons Ontario does not have to concern itself at this time with application of the equals concept to banking or to credit unions. The provinces have no authority to legislate in respect of banking unless or until a constitutional amendment comes into being, in which event the entire field of jurisdictional issues will be re-opened to negotiation. Credit unions are restricted to local operations by their very nature and membership and so have not pressed for multi-jurisdictional licensing. There is no apparent reason why the concept, if found appropriate for other sectors, could not be extended to credit unions in future although one hopes that the credit unions are currently more interested in pursuing avenues other than extra-territorial expansion.

The securities business involves other considerations and in effect has a sort of equals approach to inter-jurisdictional matters

now. The regulatory structure is somewhat different from that of the other financial sectors because the nature of the regulated function is essentially different for securities, where market intermediation is what is regulated, and loan, trust and insurance, where financial intermediaries are what is regulated. Some further extension of the equals concept at a practical level has been called for, not by regulators but by industry participants. In its submission to the Task Force, the Securities Industry Capital Markets Committee states as follows:

> Members of more than one of the self-regulatory organizations are, pursuant to an arrangement among the self-regulatory organizations, subject to the audit jurisdiction of only one such organization. This limited division of jurisdiction among the five self-regulating bodies has been in effect since 1970. The main reasons for the arrangement are to ensure that members are not subjected to conflicting rules and regulation and to avoid duplication of effort and expense on the part of members and of the self-regulating bodies with respect to membership and regulation of standards and business conduct.
>
> It is the view of the Committee that any securities firm carrying on business in Ontario should be required to register with the OSC and to conform to Ontario law and to the rules of the relevant self-regulatory organizations regardless of whether the firm is incorporated federally, in Ontario or in another province. The objective of many of these rules is to establish a high level of investor protection and there is no justification for relaxation of regulations designed to attain this

> important objective in respect of extra-provincially incorporated firms.[40]

Still, securities administrators are part of a highly developed network of inter-provincial relations based less on law and structure than on pragmatism, co-operation and efficiency. Perhaps the other sectors should take up the offer made by the OSC in the GLIS Report:

> Because of the many jurisdictions involved and because the pressures put on one segment by another segment will not go away, we believe that there is a need for all regulators or participants in the financial system to meet, on a regular basis, to develop a compatible approach to resolving the pressures on the conventional organization of our financial system. Regulators must anticipate the issues arising from these pressures and must not always be in the position of having to react to private sector initiatives.[41]

V. THE OPPOSITION AND OTHER PERSPECTIVES

The Opposition

The major disadvantages expressed in relation to the equals approach are the increased demands that it will make both on regulatory resources and on the political system. Close co-operation and collaboration with the other provinces and with the federal government are prerequisite to its smooth operation and to the absence of a constitutional challenge. Federal-provincial and inter-provincial relations may suffer if the system is seen as intrusive or presumptuous.

However, the general view is that most provinces are waiting for Ontario to take the lead in this area and expect to follow suit with reasonably uniform legislation. Except for Quebec, whose regulatory policy is already quite different from that of Ontario, no major provincial opposition is foreseen. Ontario's action in introducing equals legislation can be challenged by Quebec on philosophical grounds but cannot seriously be criticized as overbearing or arrogant when Quebec single-handedly introduced and enacted its own policy without even attempting to achieve provincial consensus.

Whether federal-provincial relations will suffer is an open question. The federal position has always been to await uniform legislation. Failing that, and it is not Ontario who has precipitated any such failure, the federal position might be to support equals legislation. Federal concern about the equals approach is due to what it perceives as the potential for 'balkanization'. According to the federal philosophy, the preferable approach is 'harmonization'.

Although federal advocates consistently use the word (or invented term) 'harmonization' to describe any federal initiative, it is only the provinces who can truly harmonize with the other provincial

governments in terms of developing national policies; the federal option must of necessity impose a single uniform centralist policy rather than attempt to develop a co-ordinated harmonious approach which reflects and accommodates regional differences and provincial interests.

One might almost suggest that the unrelenting use of yet another coined word, 'balkanization', in every federal reference to provincial participation in the regulation of financial services is more devisive than any antagonism among the provinces themselves who have shown remarkable flexibility and ability in uniting to form regulatory coalitions when necessary.

The concern about regulatory resources stems from prejudices about provincial supervisory capacity as far back as the Porter Commission. But many of the inspection and supervisory techniques recommended in the Porter Report have already been implemented, and not by the federal government as was suggested, but by the provinces.

Porter generally argued for much greater centralization in the regulation of Canadian financial institutions. Provincial regulation, it was argued, had been inconsistent, contradictory, overlapping and confused, and supervision and inspection procedures poorly carried out. These provincial deficiencies in large part formed the basis of the rationale for greater federal intervention. But many of these deficiencies have since been overcome, not by imposition of federal control, but by efforts at the provincial level.

In the securities field, for example, the goal of a uniform regulatory framework, which Porter concluded should be achieved through a national agency, has effectively been agreed upon and implemented by the provinces without interference at the federal level. In loan and trust, uniform inspection and disclosure requirements have been agreed to by federal and provincial governments across Canada in the interests

of all administrators, institutions and depositors. Insurance policies are now uniform throughout the country.

In the last 20 years, the provinces have shown their willingness and ability to find the common ground and to put it into practice. There are areas where central regulation may make the most sense - deposit insurance, for example - and where federal regulation is welcome and invited. But unless one is an inflexible unwavering centralist on principle and argues for federal regulation of every sector that involves an element beyond the strictly local, it is not necessary to argue for federal regulation over adequately provincially-regulated sectors, or sectors where the provinces have the capacity to regulate adequately in due course.

In truth the most pressing argument against federal intervention is its lack of flexibility in meeting regional needs and concerns. In federal regulation, the basic element is an absolutely fixed and uniform piece of legislation applying equally to all situations. When the provinces work towards uniformity, they mean similar legislation across jurisdictions with workable solutions to inter-provincial problems wherein individual differences and circumstances may be taken into account.

A decline in Ontario's share of the capital market has been cited as yet another potential negative result of the implementation of the equals approach. Since Ontario has the largest share of the Canadian capital market, it is unlikely that financial institutions would cease operations here in order to avoid application of Ontario law if it meant losing the lucrative Ontario market at the same time. The same fear, expressed form another perspective, is that implementation of the equals principle might lead to jurisdiction shopping. However, no firm that plans to operate in Ontario will acquire any benefit by shopping for a more compatible jurisdiction elsewhere since it will

ultimately have to meet Ontario standards in any case when it applies for registration under the new Ontario Act.

OTHER PERSPECTIVES

a) The Federal Green Paper

The recent federal Green Paper, while having serious jurisdictional implications, says remarkably little and nothing new about regulation in a multi-jurisdictional country. Most of what is written on 'federal-provincial harmonization' is taken verbatim from the federal discussion papers released last year. Developments in the area of jurisdictional co-operation seem to be keeping a rather slow pace, especially in view of the cry of urgency from so many sources.

Still the official federal policy remains unchanged and is, at least on the surface, an endorsement of the general principle of co-operation and collaboration among governments. The paper does not put forth any definitive or even very clear statement of how it intends to proceed in this area but does admit that "the federal and provincial governments could attempt to harmonize their approaches to regulatory change. This is the federal government's preferred route. With the new spirit of co-operation that has been brought to federal-provincial relations, this approach has a good chance of succeeding."[42]

Again, exactly what this approach consists of is unclear, and one wonders if the 'new spirit of co-operation' infers provincial willingness to accept federal policy or federal openness to provincial desires.

Another issue raised by the Green Paper is the question of how the existing division of regulatory powers may be affected by the interposing of a new federally-regulated entity, the financial holding company. The interaction of current provincial legislative schemes with new federal plans is not discussed in the paper. It is hoped that the soon-to-be-released technical papers may offer some further

clarification on these points and on the implications for current provincial supervisory procedures, some of which may be superseded by a comprehensive federal supervisory body.

In a paper presented to the recent Ontario Economic Council conference on regulation of financial institutions, William Moull, Ed Waitzer and Jacob Ziegel suggest that the Green Paper proposals "may accentuate rather than relieve the regulatory imbroglio in the absence of broad federal-provincial consensus" because (i) Quebec is tending towards a more direct form of deregulation; (ii) the provinces may resist imposition of federal standards on provincial corporations that are part of a new conglomerate; (iii) the federal government may lack constitutional authority to regulate with respect to provincial companies; (iv) differences in regulation between the various jurisdictions are not addressed; and (v) the federal proposals will not prevent the creation of provincially-sanctioned financial holding companies.[43]

According to Tom Courchene at the same conference, "Another interpretation of the Green Paper is that Ottawa is cleverly utilizing the federal power over banking or commercial lending to exercise an end run on provincial powers. I am not very enthusiastic about this development since provincial control over the securities industry has served our nation well. For policies to be national they need not be central."[44]

b) Current Studies

The Federal Deposit Insurance Corporation in the United States is currently examining some of the inter-jurisdictional problems in the regulation of American financial institutions. Some difficulties, for example, have arisen where institutions have abused the regulatory system by structuring their businesses in such a way as to fall between the cracks of state and federal regulation. The U.S.

situation is interesting for its illustrations of typical jurisdictional precepts and principles, such as the divide and conquer theory of federal regulation. However, American separation of powers between levels of government is different from Canadian and offers little of practical application to our regulatory assessment.

Like the U.S. experience, cross-jurisdictional problems at the international level are also the focus of study for various groups of administrators. The Basle Concordat, for example, is an agreement of international bank supervisory atuhorities who meet regularly to work towards better co-ordinated regulation of international banking. Members of the Concordat exchange information on supervisory practices and seek to harmonize regulations in particular areas of regulation.

The Canadian Uniform Law Conference is still another body in the field of conflict of laws working towards uniformity of legislation in several fields. Perhaps recourse might be had to their expertise when plans for devising uniform legislation in the financial sector finally materialize.

c) Submissions to the Task Force

The written submissions to the Task Force have not shed a great deal of light on the topic of jurisdictional problems. Most briefs stress that confusion and duplication between the two major regulatory jurisdictions should be eliminated and that both levels of government should co-operate to achieve greater consistency of regulation. At least four submissions indicate a clear preference for federal control over the regulation of all financial institutions; several more make reference to the goal of uniformity of legislation (although without further elaboration on their part it is difficult to know the full extent of their meaning of 'uniformity').

Only two submitters directly address the topic of the equals approach per se and only one, the Trust Companies Association, voices a strong criticism of the concept, worded as follows: "We are deeply concerned by these developments which we see as posing a real and serious threat to the continued existence of a national market for financial services in Canada. Given the limited size of the Canadian market, further fragmentation would be a grave mistake."[45] The strongest explanation for this viewpoint appears in the next paragraph where it is stated, "Lack of co-ordination of legislative and regulatory initiatives among the various jurisdictions would seriously damage the ability of trust and loan companies to compete with the banks and add to the banks' dominance of the financial services industry." Unfortunately, the Association has little to offer by way of solution but suggests that perhaps a joint federal-provincial body could be formed to assume responsibility for the regulation and supervision of the financial services industry.

The Canadian Bankers' Association suggests that accountability for inspection and supervision of CDIC members should be removed from CDIC and vested in provincial and federal regulatory authorities; Mr. Sarpkaya, on the other hand, proposes that the Government of Ontario should delegate all of its powers in respect of the supervision and inspection of Ontario financial institutions to the CDIC.

Similarly contradictory positions are taken, but not argued very strenuously, on several issues. For example, a number of briefs proposed new structures to co-ordinate federal-provincial initiatives. These ranged from a standing committee of the responsible ministers and their advisers to the appointment of an Ontario government staff person or financial services co-ordinator responsible for extra-jurisdictional issues. None of the proposed solutions was discussed in detail or went much beyond the platitudes offered time and again on this topic by other sources.

VI. SUMMARY

In attempting to make decisions about jurisdictional issues in the regulation of Canadian financial institutions, a flexible and co-operative approach is essential. As the Ontario Securities Commission wrote in its GLIS decision, "Regulators of all participants in the financial system should develop an environment which encourages competition, innovation and the promotion of new products to serve the consumers of financial services. Regulators of the Canadian financial system cannot afford to be rigid. Rigid administration of the laws drawing the lines amongst the financial segments will only lead to a breakdown of the segregated system."[46]

Within the current structure of regulation and supervision of extra-territoriality, there is sufficient precedent and foundation to form the basis of a workable system of multi-jurisdictional collaboration. Regulators in the securities field, in insurance and in loan and trust already meet regularly for the purpose of seeking uniformity of policy and procedures across Canada. Action by Ontario bodes just as well for a harmonious and compatible system of regulation in the many jurisdictions in Canada as does the prospect of increased regulation at the federal level.

It is important to keep in mind that differing perspectives on this issue are not confined to the dispute between Ottawa and Toronto. All provincial governments across the country have views which they want represented in the uniform or nearly uniform legislation that is everyone's goal. Moreover, whether these interests can even be accommodated by imposition of a single federal regulatory jurisdiction is open to question.

The only province to take a significant departure from prevailing theories of financial regulation in Canada is Quebec.

Whether Ontario adopts the equals approach or not, there is no evidence to suggest that Quebec will be more open to a uniform regulatory standard imposed by the federal government than it will be to negotiating a workable solution with the other provincial governments. In fact, Quebec may be more co-operative with the provinces than with Ottawa.

If Quebec's position is and continues to be significantly different from that of all other provinces, one alternative to using an equals approach to achieve the greatest possible degree of harmony is federal intervention and enforced 'harmonization'. The equals concept represents a co-operative approach and the co-operative model has been endorsed in theory by numerous, if not most, interested parties and policy experts. Should it be abondoned now in favour of a federal model disguised by a shell of federal-provincial consultations? Surely this would not be in Ontario's interests. Courchene puts it this way in discussing the prospect of federal regulation in the securities industry.

> .... (T)he question of a major federal presence in the securities legislation area boils down to the issue of the manner in which such a move could enhance the efficiency of the existing securities market....Some improvements are clearly in order and a federal role may provide the needed catalyst. However, there is also the downside risk to consider. The move will certainly generate substantial uncertainty not to mention the likelihood that it will rekindle federal-provincial confrontation. There will almost certainly be an increase in bureaucracy and perhaps a dual level of regulatory legislation. Moreover, there will be a very different set of pressures put to bear on such

> an agency. For example, I would place even money that one of the first moves of a Canadian SEC would be, in name of regional equality, to develop and fund a Maritimes Stock Exchange.[47]

If we endorse the co-operative, as opposed to federal, model then the issue shifts and becomes one of method and degree rather than fundamental difference. Various blueprints have been proposed, none of which stands out as a paragon. In fact, most suggested methods of achieving harmony are either greatly lacking in detail (as in the various written submissions to the Task Force) or overly complex and academic (as in the Moull-Waitzer-Ziegel scheme).[48]

Many commentators, especially those who are practitioners as opposed to theorists, have suggested that discussion of the changing regulatory environment for Canadian financial institutions is becoming tedious and that further analysis is ridiculous. If this is true, then the advisable course for the Task Force is to make as emphatic and practical a recommendation as it possibly can to try to force the issue and make some headway that consists of more than repetitive discussion.

If Ontario is going to continue a) to maintain a leadership role in the regulation of financial institutions by the provinces in Canada, and b) to be a regulator on equal footing with the federal government and c) to have any control over its own regulatory destiny at all, then it should act now.

Ontario's primary objectives in determining whether the equals approach or some other policy is called for should be 1) the protection of Ontario residents from insolvencies of financial institutions; 2) the protection of Ontario financial institutions from unfair advantage given to their competitors for Ontario customers; and

3) an adequate supervisory structure and regulatory control over any financial institution licensed to carry on business in this province.

Ontario can assert its position in this field by proceeding with immediate implementation of a plan to meet these objectives and by initiating and organizing the serious co-operative and consultative process that is required and has been postponed for so long.

FOOTNOTES

1. Richard Schultz, "The Regulatory Process and Federal-Provincial Relations", in The Regulatory Process in Canada, edited by G. Bruce Doern (Toronto: Macmillan, 1978) at p. 130.

2. See Richard H. Leach, "Interprovincial Co-ordination" in The Provincial Political Systems: Comparative Essays, edited by David J. Bellamy, Jon H. Pammett and Donald C. Rowat (Toronto: Methuen, 1976).

3. Richard J. Schultz, Federalism and the Regulatory Process, (Montreal: Institute for Research on Public Policy, 1979) at p. 14.

4. See, for example, Philip Anisman and Peter W. Hogg, "Constitutional Aspects of Federal Securities Legislation", in Proposals for A Securities Market Law for Canada, Vol. 3 (Ottawa: Consumer and Corporate Affairs Canada, 1979) at pp. 156-157.

5. In addition to the other sources cited in this paper, the Ontario Securities Commission also argued for a form of federal regulation in the securities market in its 1967 paper "The Case for a National Securities Commission".

6. Select Committee on Company Law on Loan and Trust Corporations, Report, (Toronto: 1975) at p. 9.

7. Ibid, p. 27

8. A discussion of a number of these sources follows. See also several written submissions to the Task Force, and a column by James C. Morton, "What happened to federal securities law proposals?" in Ontario Lawyers' Weekly, April 26, 1985, p. 4.

9. Royal Commission on Banking and Finance (1964), Report, (Ottawa: Queen's Printer) p. 561.

10. Thomas J. Courchene, "Regulating the Canadian Financial System: Paradigms, Principles, and Politics", a background paper for the Conference on the Changing Regulatory Environment for Canadian Financial Institutions (Toronto: May 22-23, 1985).

11. Ibid., at p. 58.

12. Anisman and Hogg, supra, at p. 139.

13. William D. Moull, Edward J. Waitzer, Jacob S. Ziegel, "Constitutional Aspects and Federal-Provincial Relations", a background paper for the Conference on the Changing Regulatory Environment for Canadian Financial Institutions, (Toronto: May 22-23, 1985) at p. 53.

14. Ontario Securities Commission (1983), Report on Implications for Canadian Capital Markets for the Provision by Financial Institutions of Access to Discount Brokerage Services (Toronto: Dataline, Inc.) at p. 72.

15. See supra, note 9 at p. 344.

16. Ibid., pp. 348-349.

17. See supra, note 1 at p. 129.

18. John H.C. Clarry, "Dealing in Securities - Bank Act Provisions and Regulatory Issues", in Banking Law and Practice (Toronto: Insight Educational Services, 1984) at pp. 35-38.

19. See supra, note 9 at p. 362.

20. Purdy Crawford and James Lisson, "Bank Securities Activities: Underwriting and Selling Group Participation", in Banking Law and Practice, supra, at p. 2.

21. For a discussion of the case law on the jurisdictional disputes over securities regulation, see Joint Securities Industry Committee, "Discount Brokerage and The Role of Financial Institutions" (June 10, 1983).

22. See supra, note 14.

23. Ibid., at pp. 32-33.

24. Ibid., at p. 41.

25. See supra, note 9 at p. 113.

26. Ibid, at p. 563.

27. Ibid, at p. 169.

28. Credit Unions and Caisses Populaires Act R.S.O. 1980, c. 102, s. 140.

29. Ibid., s. 11(4).

30. See supra, note 9 at p. 563.

31. See especially the internal MCCR documents on Bill 75.

32. Courchene, supra at p. 80.

33. See supra, note 6 at p. 27.

34. Proposals for Revision of the Loan and Trust Corporation Legislation and Administration in Ontario (Ontario Ministry of Consumer and Commercial Relations, November 1983) at p. 19.

35. Standing Committee on Administration of Justice, Report on White Paper on Loan and Trust Companies (May 1984) at p. 10.

36. Churchill Falls (Labrador) Corporation Ltd. et al v. A.G. Newfoundland et al (1984), 8 D.L.R. (4th) 1 (S.C.C.).

37. Ibid.

38. Report of the Study Committee on Financial Institutions (Government of Quebec, June 1969) at pp. 211-212.

39. "Graduated Regulatory Response of the Registrar", a staff presentation of the Financial Institutions Division, Ministry of Consumer and Commercial Relations, July 16, 1984.

40. Securities Industry Capital Markets Committee, Submission in Response to The Interim Report of the Ontario Task Force on Financial Institutions, May 1985, at p. 49.

41. See supra, note 14 at pp. 72-73.

42. The Regulation of Canadian Financial Institutions: Proposals for Discussion (Ottawa: Department of Finance, 1985) p. 27.

43. Supra, note 13 at pp. 56-57.

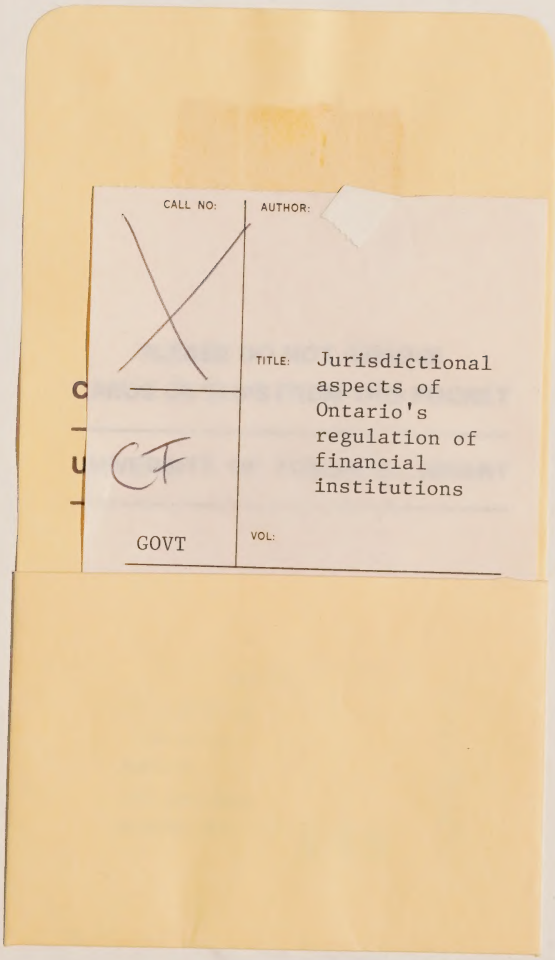
44. Supra, note 10 at p. 82.

45. Trust Companies Association of Canada, Submission to the Ontario Task Force on Financial Institutions, March 1985, at p. 24.

46. Supra, note 14 at p. 68.

47. Supra, note 10 at pp. 61-62.

48. See Supra, note 13.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